

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
AT TACOMA

10 KEITH L. NASH,

11 Plaintiff,

12 v.

No. C09-5178RBL

13 ELDON VAIL, *et al.*

ORDER

14 Defendants.
15

16 This 42 U.S.C. § 1983 Civil Rights action has been referred to the undersigned
17 Magistrate Judge pursuant to 28 U.S.C. §§ 636(b)(1)(A) and 636(b)(1)(B) and Local Magistrate
18 Judges' Rules MJR 1, MJR 3, and MJR 4. Plaintiff submitted his Complaint on March 26, 2009,
19 along with an application to proceed *in forma pauperis*, which has been granted.

20 Plaintiff is suing prison officials and employees based on acts occurring over an
21 approximate two-year period -- May 2007 through March 2009. Plaintiff was released from
22 prison in November 2007. After release, Plaintiff violated his conditions of his release and in
23 February of 2009, Plaintiff's probation officers imposed certain additional conditions for his
24 continued release.
25

26 Having reviewed the record, the undersigned finds and orders as follows:

ORDER - 1

1 Generally, when a complaint is filed by a prison inmate and IFP is granted, the court will
2 direct the U.S. Marshal to serve summonses and copies of the Complaint. In this case, because
3 of the deficiencies in the Complaint, the court will not serve the summonses and Complaint on
4 defendants. Plaintiff must either file an Amended Complaint curing the deficiencies or file a
5 brief showing why the claims are not deficient by **June 4, 2009**, otherwise the court will
6 recommend dismissal of this matter as frivolous.
7

8 In his Complaint Plaintiff names the following ten individuals as defendants: Eldon Vail,
9 Karen Daniels, Armando Mendoza, Robert Story, Brian Agar, Devon Schrum, Mr. Timothy,
10 Gelinda Amell, Rick Robinson, and Anthony Shaver. Plaintiff states that the Complaint is being
11 brought to allege U.S. Constitutional violations pursuant to 42 U.S.C. § 1983. Without providing
12 any further legal basis or legal authority for his claims, Plaintiff asserts the following seven
13 causes of action: (i) denial of equal protection, (ii) denial of “substantial” due process, (iii)
14 discrimination, (iv) conspiracy, (v) infringement, (vi) harassment, and (vii) cruel and unusual
15 punishment.
16

17 Plaintiff alleges forty-six (46) paragraphs of “facts” to support his Complaint. In support
18 of each asserted cause of action, Plaintiff has simply copied and pasted certain of the alleged
19 facts that allegedly support each cause of action. For instance, to support his eighth cause of
20 action (cruel and unusual punishment), Plaintiff has simply copied factual allegations numbered
21 five, ten, thirteen, twenty-one, and twenty-three.
22

23 In order to state a claim under 42 U.S.C. § 1983, a complaint must allege that: (1) the
24 conduct complained of was committed by a person acting under color of state law and (2) the
25 conduct deprived a person of a right, privilege, or immunity secured by the Constitution or laws
26 of the United States. Parratt v. Taylor, 451 U.S. 527, 535 (1981), *overruled on other grounds*,

1 Daniels v. Williams, 474 U.S. 327 (1986). Section 1983 is the appropriate avenue to remedy an
2 alleged wrong only if both of these elements are present. Haygood v. Younger, 769 F.2d 1350,
3 1354 (9th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986). A plaintiff must allege a deprivation of
4 a federally protected right in order to set forth a prima facie case under 42 U.S.C. §1983. Baker
5 v. McCollan, 443 U.S. 137, 140 (1979).

6 A complaint is frivolous when it has no arguable basis in law or fact. Franklin v.
7 Murphy, 745 F.2d 1221, 1228 (9th Cir. 1984). When a complaint is frivolous, fails to state a
8 claim, or contains a complete defense to the action on its face, the court may dismiss an in forma
9 pauperis complaint before service of process under 28 U.S.C. § 1915(d). Noll v. Carlson, 809
10 F.2d 1446, 575 (9th Cir. 1987) (*citing* Franklin v. Murphy, 745 F.2d 1221, 1228 (9th Cir. 1984)).

11 Plaintiff's complaint contains claims that do not appear to be federal civil rights or U.S.
12 Constitutional violations. For instance, Plaintiff claims conspiracy as his fourth cause of action,
13 infringement as his fifth cause of action, and harassment as his sixth cause of action. Conspiracy
14 and infringement do not provide a basis for a federal or constitutional cause of action. The court
15 cannot discern the federal or constitutional basis for these claims. The factual allegations made
16 in support of any of these three causes of action are not specific enough to identify a cognizable
17 claim. Furthermore, verbal harassment or abuse is insufficient to form the basis of a
18 constitutional deprivation. Oltarzewski v. Ruggiero, 830 F.2d 136, 139 (9th Cir. 1987). In
19 reviewing each of Plaintiff's causes of action, giving the benefit of every doubt to Plaintiff, the
20 court cannot discern a federal or constitutional violation.

21 Plaintiff shall either amend his pleadings to clearly show what federal or constitutional
22 civil right is being violated, otherwise the court should dismiss these claims.
23
24
25
26

1 Additionally, Plaintiff must allege facts showing how individually named defendants
2 caused or personally participated in causing the harm alleged in the complaint. Arnold v. IBM,
3 637 F.2d 1350, 1355 (9th Cir. 1981). A defendant cannot be held liable under 42 U.S.C. § 1983
4 solely on the basis of supervisory responsibility or position. Monell v. New York City Dept. of
5 Social Services, 436 U.S. 658, 694 n.58 (1978). A theory of *respondeat superior* is not sufficient
6 to state a § 1983 claim. Padway v. Palches, 665 F.2d 965 (9th Cir. 1982).

7
8 Of the ten defendants named in his Complaint, most of them appear to have been named
9 based on their supervisory role or capacity. For example, Eldon Vail is the Secretary of the
10 Washington State Department of Corrections and Karen Daniels is Assistant Secretary of the
11 Washington State Department of Corrections. Mr. Vail is named in three of the seven causes of
12 action in factual allegations twenty-eight and thirty-five. Ms. Daniels is named only in
13 Plaintiff's fourth cause of action (conspiracy). The factual allegations pertaining to Mr. Vail and
14 Ms. Daniels state:

15
16 28. On November 14th, 2008 I provided defendant Eldon Vail and this
17 court with a copy of my "meet to confer" requirement in order to resolve issues
18 which I believe that my constitutional rights were being violated by defendants
19 Gelinda Amell and Rick Robinson and I did not receive any response from
20 defendant Eldon Vail.

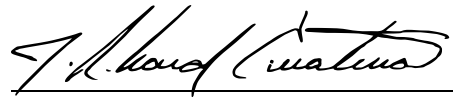
21 35. On February 2nd, 2009 defendants Eldon Vail and Karen Daniels were
22 (DOC) secretary and assistant secretary when plaintiff provided prior notification
23 regarding (RMA) offenders that needed available relief through (DOC) funding
24 for housing and living arrangements in which both individuals failed to correct or
25 provide relief in order to prevent another (RMA) offender from murdering a local
26 Clark County female because the offender was a (RMA) homeless offender like
the plaintiff.

Similarly, Defendants Mendoza, Agar, Schrum, Story, and Mr. Timothy all appear to be named
without the requisite personal participation and/or in their supervisory roles.

1 In order to survive summary dismissal by the court, Plaintiff must amend his pleadings to
2 show how each defendant personally participated in a cognizable claim based on a violation of
3 his federal civil rights or the U.S. Constitution.

4 5. The court now **ORDERS** Plaintiff to either file an Amended Complaint curing the
5 deficiencies or file a brief showing why the claims are not deficient by **June 4, 2009**, otherwise
6 the court will recommend dismissal of this matter in its entirety as frivolous.
7

8 DATED this 6th day of May, 2009.

9
10 

11 J. Richard Creatura
12 United States Magistrate Judge
13
14
15
16
17
18
19
20
21
22
23
24
25
26